FILED
APR 12 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1555

JULIO MUNIZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Julio Muniz, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on March 12, 1979.

OPINIONS BELOW

The opinion of the original panel of the Court of Appeals was an oral opinion issued in open court, see Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ISSUES PRESENTED

1. Whether the District Court should have dismissed the indictment for pre-indictment delay since the defendant suffered actual prejudice resulting from the intentional tactics of the Government.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * *

Section 841(a)(1), Title 21, United States Code, provides in pertinent part:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

STATEMENTS OF FACTS

This offense arose out of an occurrence on or about February 11, 1974 in Willamantic, Connecticut, where the defendant allegedly sold approximately 1.5 grams of heroin to Special Agent Henry Moniz, Jr. Following a grand jury indictment, an arrest warrant was issued on September 8, 1977, forty-three months after the alleged offense. The defendant moved for dismissal of the indictment based on a Due Process violation and a denial of right to a fair trial under the Fifth and Sixth Amendments to the United States Constitution due to preindictment delay resulting in actual prejudice. The motion was denied. A jury trial was held and the defendant was found guilty. The court sentenced him to six years in the custody of the Attorney General of the United States.

In February, 1974, the federal Drug Enforcement Administration (DEA) was conducting an investigation in the Willamantic, Connecticut area in cooperation with Connecticut state police and local police. (Tr-md. 6-7). In the course of that investigation, two cooperating individuals, Victor Cuevas and Gladys Hernandez gave information regarding an individual named Julio whose last name was unknown. (Tr-md. 9). On February 11, 1974, Special Agent Henry Moniz, Jr. made contact with Cuevas and Hernandez (Tr-md. 10; 66) to have them assist him in setting up a sale of narcotics (Tr-md. 11). That same evening, Moniz, accompanied by Cuevas and Hernandez entered a pool hall/tavern (Tr-md. 15, 66) occupied by approximately five Spanish speaking males (Tr-md. 66-67). At that time, Agent Moniz met the individual named Julio (Tr-md. 68-69). Since Agent Moniz did not speak Spanish, Cuevas translated most of

their conversation. (Tr-md. 69). During this meeting, the individual named Julio and the agent negotiated the sale of two spoons of heroin for $250.00. (Tr-md. 69). Sometime later that evening Agent Moniz was given the heroin. (Tr-md. 69). Shortly thereafter Moniz, Cuevas, and Hernandez met with Agent Sherry and others from the DEA (Tr-md. 15; 70-71). That same evening or the following day (Tr-md. 16; 57-58; 60-81) Agent Sherry requested any photographs of people named "Julio" found in the files of the Willamantic Police Department. (Tr. 77, 96). He received only one photograph, that of Julio Muniz. (Tr-md. 16-17).

Agent Sherry showed only the photograph of Julio Muniz to Agent Moniz who identified the photograph as that of the "Julio" who sold him heroin. (Tr-md. 17). In addition, the police supplied Agent Sherry with biographical data which included Julio Muniz's last known address, date of birth, physical description, Connecticut State Bureau of Identification number, and Federal Bureau of Investigation number and possibly a social security number. (Tr-md. 18-20). On March 5, 1974, Agent Sherry received a second address for Julio Muniz. (Tr-md. 26). Yet, although he had this information, he failed to obtain an arrest warrant on either occasion. (Tr-md. 20).

On February 14, 1974, Agent Moniz made a second contact with the individual known as Julio. (Tr-md. 21; 73). On February 19, 1974, Agent Sherry learned from Cuevas and Hernandez that Julio had left (Tr-md. 23) or was planning to leave Connecticut (R. 22). Although Agent Sherry testified that he did not immediately arrest the individual to protect the informers, (Tr-md. 40-41), he knew, on February 19, 1974, that both Cuevas and Hernandez were known in the community to be working with the government (Tr-md. 48-49). After

February 19, 1974, "Julio" never came up in the investigation again. (Tr-md. 23, Tr. 78-79). Agent Sherry was in contact with state authorities regarding the undercover operations. (Tr-md. 23-24). At that time he, with the knowledge of the United States Attorney's Office, requested that the state police "take responsibility of furthering the investigation, based on our information." (Tr-md. 24). Moreover, Agent Sherry "wasn't trying to apprehend [Julio Muniz] at all." (Tr-md. 25). On May 2, 1974, Agent Sherry learned that Muniz may be in either Puerto Rico or New York City. (Tr-md. 26-27). Since the DEA and other federal agencies "were not trying to apprehend him at that time" (Tr-md. 27), Agent Sherry did not direct anyone to attempt to locate the defendant.

In May, 1974, the DEA turned over its file, in its entirety, to the State Police. (Tr-md. 28). Although the government did not close its files, it ceased all direct activities on the case (Tr-md. 29). In January, 1975, Agent Sherry learned that an arrest warrant was issued. (Tr-md. 29). Nevertheless, during 1975, 1976 and 1977, he never inquired to see if the State had placed the warrant in the National Crime Information Center. (Tr-md. 29-30). Furthermore, he never checked with the Federal Bureau of Investigation computer to see if the warrant was lodged therein. (Tr-md. 30). Significantly, from January 29, 1975 through August, 1977, defendant's name had surfaced in various unrelated federal investigations in Puerto Rico and Chicago. (Tr-md. 30-31). In fact, it was not until the summer of 1977, over three years after the alleged offense, that Agent Sherry pursued the investigation further. (Tr-md. 30-31). On August 25, 1977, the United States Attorney's Office requested that the bench warrant issued by the State be withdrawn. (R. 22). On September 8, 1977, (Tr-md. 31)

an indictment was issued, after which Agent Sherry entered a general fugitive declaration. (Tr-md. 31). However, he made no specific inquiries with the Social Security Administration or any other governmental agency to obtain the biographical data which would have assisted in finding Muniz. (Tr-md. 31).

In early 1978, an Internal Revenue Service Special Agent located the defendant in Chicago. (R. 22). On April 17, 1978, the defendant was arrested in Chicago, (R. 22) four years and two months after the alleged offense.

During the forty-three months between the alleged offense, the two individuals, Cuevas and Hernandez, who set up the drug transaction were lost to state, local and federal authorities. Agent Chupron, of the Hartford Department, remained in contact with them through 1976, (Tr-md. 82), over two years after the alleged offense. At trial these two individuals were unavailable to testify, and Agent Sherry was unable to identify the defendant. (Tr. 78). Thus Agent Moniz as the only eye-witness to the transaction, was the sole identifying witness at trial.

As noted previously, Agent Moniz consummated a drug transaction on February 11, 1974. This transaction occurred in two fairly well lit rooms, with contacts lasting a few brief minutes. (Tr. 25). Since Agent Moniz neither spoke nor understood Spanish, Cuevas and Hernandez interpreted during most of the transaction. (Tr. 25-26; 28-29). After the transaction was completed, Agent Moniz met with DEA agents (Tr. 30) during which time he gave a physical description of the individual named Julio. (Tr. 31; 56-57). Agent Moniz testified at the grand jury that he was shown a picture of the defendant on the same night as the alleged

occurrence. (Tr. 60-61), although at trial he testified that he did not view the photograph until the next day. (Tr. 57-58). The photograph, which Agent Moniz viewed, was gleaned from local police files, but was not based on the description given by Moniz, but rather from the name "Julio". (Tr. 96). Agent Moniz identified the person in the photograph as the individual who sold him the drugs after he was asked if he recognized the person in the photograph. (Tr. 60). He later testified that he "did a lot of praying" during the transaction (Tr. 64) because he was "placing (himself) in jeopardy." (Tr. 68). After "placing (himself) in jeopardy" and after viewing the photograph, Agent Moniz wrote his report regarding the transaction. He included in this report information Agent Sherry obtained from data included with the photograph. (Tr. 59-60).

Agent Moniz again saw the suspect on February 14, 1974, and did not identify him again until May 1, 1978. (Tr. 40). At that time, he identified Julio Muniz as the individual involved in the drug transaction occurring over four years previously. (Tr. 40).

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT SHOULD HAVE DISMISSED THE INDICTMENT FOR PRE-INDICTMENT DELAY SINCE THE DEFENDANT SUFFERED ACTUAL PREJUDICE RESULTING FROM THE INTENTIONAL TACTICS OF THE GOVERNMENT.

Although the applicable statute of limitations provides the outer time limits during which criminal charges may be brought, the Due Process Clause of the Fifth Amendment mandates dismissal of an indictment if it is shown that "the pre-indictment delay . . . caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. 307, 322, 324 (1971). Both proof of actual prejudice and the reasons for the delay must be considered before finding such a Due Process violation. *United States v. Lovasco*, 431 U.S. 783, 790 (1971).

The Ninth Circuit presents a three-pronged analysis to determine whether such a violation has occurred. The court requires consideration of the following elements: 1) actual prejudice to the defendant; 2) length of delay; and 3) reasons for delay. *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977); See also, *United States v. Titus*, 576 F.2d 210 (9th Cir. 1978); *United States v. Shaw*, 555 F.2d 1295 (5th Cir. 1977). *See* also, *United States v. King*, 560 F.2d 122 (2d Cir. 1977).

A. The Defendant Suffered Actual Prejudice From The Pre-Indictment Delay.

As the Court stated in *United States v. Lovasco*, ". . . proof of actual prejudice makes a due process claim concrete and ripe for adjudication . . ." 431 U.S. at 789. Not only must the prejudice be nonspeculative, *United States v. Mays*, 549 F.2d at 677, but also it must be substantial. *United States v. King*, 560 F.2d at 131. In the instant case, the defendant has suffered both real and substantial prejudice to his defense.

Initially, the defendant was prejudiced by time, for although he was charged with an offense occurring on February 11, 1974 (Tr-md. 14-16) he was not indicted until September 8, 1977, (Tr-md. 31) forty-three months after the alleged offense. Within that forty-three month period, two cooperating individuals/confidential informers disappeared. (Tr-md. 82). Yet, those same individuals were in contact with a Connecticut police officer through 1976, over two years after the alleged offense occurred. (Tr-md. 82). Significantly, these two witnesses, are the only individuals other than Agent Moniz capable of verifying the introduction to (Tr-md. 69) and money transaction allegedly made by the defendant to Agent Moniz. (Tr-md. 70). This lack of ability to confront those witnesses, at a minimum, denies the defendant his Sixth Amendment right to confrontation and thus prejudices his ability to present evidence that would be beneficial to his defense. Moreover, since these witnesses made the initial introduction, there is no question but that they could identify the person named "Julio".

Furthermore, this lack of potential corroboration by witnesses who were available for at least two years after the alleged offense exacerbates a somewhat tenuous identification by Agent Moniz. According to the testimony, Agent Moniz, after giving a physical description

of a drug dealer, was shown a picture of the defendant. (Tr-md. 72). Indeed, this picture was produced based on the cooperating individual's statement that the dealer was known as "Julio", and was *not* based on the physical description provided by Agent Moniz. (Tr-md. 48).

As the Second Circuit has noted,

> "we have consistently condemned the exhibition of a single photograph as a suggestive practice, and, where no extenuating circumstances justify the procedure, as an unnecessarily suggestive one."

Mysholowsky v. People of State of New York, 535 F.2d 194, 197 (2d Cir. 1976). Thus, not only did Agent Moniz make an identification based on a photograph produced because of a person's *first name*, but also he made an identification through suggestive procedure.

Significantly, "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification". *United States v. Wade*, 388 U.S. 218, 228 (1967). Even trained observers, are susceptible to erroneous identifications, P. Wall, *Eyewitness Identification in Criminal Cases* 14 (1965). Furthermore a witness who makes a positive identification may be in error. Positive identification may indeed be the most dangerous evidence known to the law. *See Smith v. Paderick*, 519 F.2d 70, 75 (4th Cir. 1975). Yet, in the present case, the defendant was convicted on the basis of *one* eye-witness's testimony because the government delayed the indictment for forty-three months. If the government had brought charges in 1974 the two informers would have been available. (Tr-md. 82). Notwithstanding their availability then, the government has now caused the defendant undue and substantial prejudice because there is no corroborating identification to the drug transaction of which he is charged.

B. The Forty-Three Month Delay Was Prejudicial.

As noted previously, the alleged offense occurred in February, 1974 while the indictment was handed down in September, 1977. Within that period of time, not only was no investigation by the government conducted, but also the two indispensable, pivotal witnesses were lost to the defense. (Tr-md. 82). Although this delay, standing alone, may not provide the requisite prejudice to show a due process violation, *United States v. Marion*, 404 U.S. at 324-5, this element should be read in conjunction with the reasons proffered by the government for the delay. *See, United States v. May*, 549 F.2d at 678.

C. The Government's Delay Was An Intentional Tactical Device As Well As A Delay Indictative Of Its Reckless Disregard Of Appellant's Right To A Fair Trial.

The government offered several reasons for delaying the indictment against the defendant. Agent Sherry stated that the defendant was not arrested because the Drug Enforcement Administration was conducting an investigation using undercover operatives, and consequently did not want to compromise their identities. (Tr-md. 40, 41). Yet, Agent Sherry also testified that on February 19, 1974, eight days after the alleged drug buy set up by these "confidential" informants, he was told that the cover of two cooperating individuals no longer existed. (Tr-md. 48-49). Thus, the need for secretiveness for the undercover operatives was no longer valid eight days after the alleged criminal activity. Moreover, on the same day, the two informants also stated that they knew the defendant was *planning* to flee to Puerto Rico. Yet, still no arrest was made.

Agent Sherry also testified that in February or March, 1974, he asked the Connecticut State Police to take the responsibility of furthering the investigation

into drug trafficking in the area. (Tr-md. 24, 42). At that time, the United States Attorney was aware of the transfer of responsibility. (Tr-md. 24). Thus, the jurisdiction over the case was transferred to the State (Tr-md. 43-44), and consequently, Agent Sherry did no further investigation on his own until January, 1975, (Tr-md. 29) and then only to learn that the warrant was issued. From January, 1975 to the summer of 1977, the government made no more investigatory efforts. (Tr-md. 29-31).

Significantly, Agent Sherry knew the address of "Julio", had general biographical data on him (Tr-md. 18) and sometime later heard he left Connecticut (Tr-md. 23) and may in fact be in New York or Puerto Rico. (Tr-md. 27). Furthermore, although he had this information, and although he knew that in January, 1975 an arrest warrant was issued by the State (Tr-md. 29), Agent Sherry made no efforts to find the defendant for over three years, (Tr-md. 25, 29-31), nor did he follow the progress of the State's case. (Tr-md. 25, 29, 30). Indeed, Agent Sherry made no attempt to apprehend the defendant nor did he attempt to ascertain the status of the State's case, even though he said his file was *not* closed. (Tr-md. 29). For at least two of those years, the cooperating individuals were available. (Tr-md. 82). Yet, Agent Sherry did nothing to ensure that an "open" federal file, albeit one transferred to another jurisdiction, contained adequate evidence and/or information to protect a defendant's right to a fair trial.

The government may argue that the initial decision not to arrest the alleged perpetrator was a decision based on investigatory techniques, hence outside judicial scrutiny. *United States v. Lovasco*, 431 U.S. at 759. However, the forty-three month delay was not based on investigatory technique, but rather on a tactical maneu-

ver to let the State take jurisdiction over what was a federal and state matter. As the record clearly shows, the government deliberately decided not to pursue its investigation further (Tr-md. 29-30) and indeed did not pursue it for several years. This delay, though perhaps superficially reasonable because another jurisdiction was ostensibly pursuing the investigation, was unreasonable in that the government abrogated all its responsibility over an "open" case. Because of the government's apparent disdain for pursuing his particular transaction and its subsequent tactical, intentional and questionable decision, not to prosecute "Julio" in 1974, while at the same time conducting *no* investigation, this fact situation falls outside of the realm of "investigative delay", *United States v. Lovasco*, 431 U.S. at 795, and brings it within opprobrium for delay "to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. at 324.

The government also posits the argument that the delay arose because the defendant left Connecticut to avoid prosecution. (Tr-md. 22). However, this argument fails for several reasons. On February 19, 1974, the Drug Enforcement Administration had information that the defendant was "planning to flee to Puerto Rico" (Tr-md. 22), *not* that he already had fled to Puerto Rico. Furthermore, by February 19, 1974, Agent Sherry had biographical data on the defendant, including his mother's address in Willamantic. (Tr-dis. 3). Yet, the government concedes that even with this information, it made no attempt to arrest him because it did not want to compromise the identity of informers whose identity was already compromised.

Assuming arguendo, the government in fact believed that the defendant had fled the jurisdiction, it still had an obligation not to abrogate its responsibility to the

defendant to ensure that he could present an effective defense. Indeed, reckless disregard of such an obligation would violate the Due Process Clause. *United States v. Lovasco*, 431 U.S. at 795, n. 17. In the instant case, such reckless disregard did occur. For, although the government had the ability to charge the defendant as early as February, 1974 or as late as March 5, 1974 (Tr-md. 15, 20) (R. 22) it chose instead to turn over the prosecution to the State, while at the same time *not* closing its file. Yet, for a file, technically open, but perhaps temporarily inactive, of a known drug dealer, the government made *no* efforts to investigate for several years. More significantly, although the government did not close its files, it did not even attempt to follow up on the State's investigation after an arrest warrant was issued in January, 1975 to ensure that the "fleeing" suspect's name was placed in the National Crime Information Center. (Tr-md. 29-30). Moreover, the government did nothing to ensure the presence or the whereabouts of the two individuals who set up the alleged drug transaction. Yet, had it made any reasonable efforts, it would have learned that sometime between 1974 and 1976, one of those individuals was dying (Tr-md. 82-83) and thus would not be able to testify should the charges be brought in the future.

Thus, although the government may, be right, allocate prosecutorial resources, *United States v. Medina-Arellano*, 569 F.2d 349, 353 (5th Cir. 1978), it may not by its negligence, *United States v. Mays*, 549 F.2d at 678, nor by its unreasonableness see e.g., *United States v. Lovasco*, 431 U.S. at 790; *United States v. Partyka*, 561 F.2d 118, 122 (8th Cir. 1977) ultimately effectuate a Due Process violation. Additionally, this delay was an intentional device to gain tactical advantage over the appellant as exemplified by the deliberateness of giving

jurisdiction to the State and the deliberateness of requesting that jurisdiction be given back to the government. (Tr-md. 30-31). Additionally, during disposition the use of post-1974 allegations from investigations indicating that the appellant's prior arrests for drug offenses (Tr-dis. 3-11) as well as the assertion that the appellant was "of higher significance" in the drug trafficking organization (Tr-dis. 6) explicitly demonstrates that what was a potentially minor drug transaction, for sentencing purposes became the corralling of a allegedly major drug figure.

Notwithstanding the obvious indifference and lackadaisical attitude the federal authorities demonstrated towards this case, the Second Circuit, by affirming the trial court, has implicitly announced a per se rule—a rule stating that whenever the federal authorities opt to have state or local authorities pursue an investigation and/or prosecution, the delay caused by the state's activity or inactivity is not chargeable against the federal government. The Second Circuit finds this permissible whether or not the federal-local efforts are coordinated, *compare United States v. Mejias*, 552 F.2d 435 (2d Cir.) *cert. denied* 434 U.S. 847 (1977) (federal-state investigation) with *United States v. Lai Ming Tanu*, 589 F.2d 82, 89 (2d Cir. 1978) ("extraordinary lack of liaison between state and federal prosecutors.") In the case before the Court not only was there an "extraordinary lack of liaison", but also there was complete inertia on the part of the federal authorities. For example, Agent Sherry, when asked several times what steps he took to personally follow the investigation, testified that he took no steps at all. (Tr-md. 28-31). Certainly, Agent Sherry's inaction as well as the inaction of the federal authorities in general, is not the same as the "partnership" concept as envisioned in

Mejias. Indeed, there was no partnership contemplated. Instead, the federal authorities completely deferred to the local authorities, so much so, that they did not know the status of the state's case. As the Second Circuit so aptly noted in *Mejias*, ". . . it is desirable that the federal government be kept apprised of state prosecutorial developments in order to assess the situation and take the necessary steps adequately to enforce the federal laws and protect the public." *Id.* at 441. The federal government not only failed to protect the public but also abrogated its responsibility to the defendant to ensure him a trial free from actual prejudice. Notwithstanding the fact that the Government is under no obligation to arrest one suspected of criminal activity as soon as probable cause exists, it must nevertheless not act or not fail to act in reckless disregard of that person's Due Process guarantees. *United States v. Lovasco*, 431 U.S. at 795, n. 17.

Significantly, the actual prejudice suffered by the defendant is irreparable. Yet this prejudice could have been prevented by the Government had it taken a few simple steps as early as 1974. For example, the offense charged occurred in February, 1974. From February to May, 1974, before the investigation was given to the state, no attempt was made to have the two informers photographically identify the suspect. In January, 1975, when Agent Sherry learned of the issuance of the state arrest warrant, he failed even the minimal test of professional procedure: he failed to see if a positive identification had been made.

Assuming *arguendo*, that a *Mejias* contemplated partnership between local and federal authorities did exist, the federal agents responsible still acted in reckless disregard of the defendant's rights. For not only did they not obtain a positive identification by the

informants, but also they failed to preserve any identification for trial purposes. If such partnership did exist, although there is no testimony to so indicate, the federal authorities should have been aware of the imminent death of informant Cuevas. (Tr-md. 82, 84). At that time, they could have and should have procured a positive identification of the suspect.

It should be further noted that in February, 1974, the informants told the agents that their identity was known. (Tr-md. 48-49). In the same time period, Agent Moniz was removed from his temporary assignment in Willamantic. Moreover, Agent Moniz's identity was also known, (R. 22, Findings 6) so that there was no way for him to continue his drug cover in Willamantic. Thus for the Government to argue that the delay was based on the hope that the defendant would return or continue to transact business with the undercover operation with the same agent and informants would be clearly unsupported by all the evidence.

Lovasco holds that

> to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.

431 U.S. at 796. *Lovasco* does not stand for the proposition that the mere transferring of jurisdiction to state or local authorities excuses the federal government from ensuring a defendant his Fifth Amendment rights. Yet to so hold, the Second Circuit has legitimatized not prosecutorial discretion but rather prosecutorial indiscretion free from constitutional constraints. In the process, it has ignored the teaching of *United States v. Lovasco*, 431 U.S. at 490—the determination of

> whether the action complained of—here, compelling respondent to stand trial after the Government

delayed indictment to investigate further—violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney v. Holohan*, 204 U.S. 103, 112, 79 L.Ed. 791, 55 S.Ct. 340, 98 ALR 406 (1935), and which define "the community's sense of fair play and decency," *Rochin v. California*, supra, at 173, 96 L.Ed. 183, 72 S.Ct. 205, 25 ALR 2d 1396. See also *Ham v. South Carolina*, 409 U.S. 524, 526, 35 L.Ed. 2d 46, 93 S.Ct. 848 (1973); *Lisenba v. California*, 314 U.S. 219, 236, 86 L.Ed. 166, 62 S.Ct. 280 (1941); *Hebert v. Louisiana*, 272 U.S. 312, 316, 71 L.Ed. 270, 47 S.Ct. 103, 48 ALR 1102 (1926); *Hurtado v. California*, 110 U.S. 516, 535, 28 L.Ed. 232, 4 S.Ct. 111 (1884).

CONCLUSION

For the above and foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of March one thousand nine hundred and seventy-nine

Present:

HON. IRVING R. KAUFMAN
Chief Judge

HON. WILLIAM H. MULLIGAN *

HON. MURRAY I. GURFEIN

Circuit Judges,

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JULIO MUNIZ, Defendant-Appellant.	78-1423

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was taken on submission.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO,
Clerk

BY:

ARTHUR HELLER,
Deputy Clerk

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* Judge Mulligan recused himself on this appeal.

Supreme Court, U. S.
FILED
JUN 1 1979
MICHAEL RODAK, JR., CLERK

No. 78-1555

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JULIO MUNIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 8-18) that the 43-month delay between the time of his offense and the time of his indictment deprived him of due process of law.

1. Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of selling heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to six years' imprisonment, to be followed by a special parole term of three years, and he was fined $10,000. The court of appeals affirmed (App. A, *infra*, 1a-3a).

The evidence showed that in February 1974 agents from various federal agencies, the Connecticut State Police, and local police departments formed a task force in order to investigate illegal narcotics activities in Connecticut. On February 11, 1974, two informants, Victor Cuevas and Gladys Hernandez, introduced Agent Moniz, a task force member, to a drug-dealer known as "Julio." That evening, accompanied by two informants, Agent Moniz purchased $250 worth of heroin from "Julio." The actual transfer of the drug took place outside the presence of the informants. The following day, Agent Moniz identified a photograph of petitioner as the "Julio" from whom he had purchased the heroin. Agent Moniz and petitioner met again on February 14, 1974, to discuss further sales of heroin, but no additional sales were made (App. A, *infra*, 2a; App. B, *infra*, 4a-5a; Tr. 24-33; H. Tr. 66-68, 78-79).[1]

Thereafter the Connecticut state officials agreed with DEA to assume responsibility for the investigation and prosecution of petitioner's case. In January 1975 the state commenced prosecution and obtained a warrant for petitioner's arrest. However, for over two years state authorities were unable to locate petitioner. Because of the state's inability to arrest petitioner and because other unrelated federal investigations had focused on petitioner, the United States Attorney for the District of Connecticut de-

[1] "H. Tr." refers to the transcript of the September 25, 1978 hearing on petitioner's motion to dismiss the indictment because of preindictment delay.

cided in August 1977 to seek a federal indictment against petitioner. Accordingly, the state withdrew its warrant on August 25, 1977, and on September 8, 1977, a federal grand jury indicted petitioner. Subsequently, federal agents located petitioner in Chicago, Illinois, and local police arrested him on April 17, 1978 (App. B, *infra*, 5a-7a; H. Tr. 41-44).[2]

2. Petitioner argues (Pet. 8-18) that the 43-month delay between the sale of heroin and his federal indictment violated his right to due process of law. However, preindictment delay does not deprive a defendant of his constitutional rights unless he can demonstrate that the delay caused actual prejudice to his defense and that the delay was improperly motivated by desire to gain a tactical advantage over the accused. *United States* v. *Lovasco*, 431 U.S. 783, 790, 795 (1977); *United States* v. *Marion*, 404 U.S. 307, 324 (1971). And here, as both courts below concluded, the delay neither prejudiced petitioner nor resulted from improper government behavior (App. A, *infra*, 2a-3a; App. B, *infra*, 8a).

"[P]roof of prejudice is generally a necessary but not [by itself] sufficient element of a due process claim * * *." *United States* v. *Lovasco*, *supra*, 431 U.S. at 790. Petitioner acknowledges (Pet. 11) that a 43-month preindictment delay does not of itself demonstrate prejudice cognizable under the Due Process

[2] An earlier search of petitioner's apartment pursuant to a warrant revealed six pounds of heroin. The state court suppressed this evidence because the warrant had issued without probable cause (Sentencing Tr. 8-9).

Clause. See, *e.g.*, *id.* at 796; *United States* v. *Marion*, *supra*, 404 U.S. at 324-325 (38-month delay); *United States* v. *Medina-Arellano*, 569 F.2d 349, 352-353 (5th Cir. 1978) (4-year delay); *United States* v. *Lane*, 561 F.2d 1075, 1077 (2d Cir. 1977) (several years' delay); *United States* v. *Pollack*, 534 F.2d 964, 969-970 (D.C. Cir.), cert. denied, 429 U.S. 924 (1976) (more than 3 years' delay). He nonetheless claims that the government's inability to locate two informants at the time of trial constituted actual prejudice.[3] But contemporaneous to petitioner's offense both informants made sworn statements inculpating him (App. B, *infra*, 5a, 8a). In these circumstances, the lower courts correctly found that petitioner had not suffered any prejudice and that there was therefore no basis for his constitutional claim (App. A, *infra*, 2a; App. B, *infra*, 8a). *E.g.*, *United States* v. *Lovasco*, *supra*.[4]

Moreover, "[n]o improper Government motive caused any delay which may have occurred" (App. B, *infra*, 8a; App. A, *infra*, 2a-3a). Rather, the delay was the result of the government's reasonable decision to allow the state authorities to investigate and prosecute petitioner[5] and of petitioner's subsequent flight

[3] The trial court expressly found that the government agents "used all due diligence in attempting to locate the informants * * *" (App. B, *infra*, 8a).

[4] Petitioner's reliance (Pet. 9) on the Confrontation Clause of the Sixth Amendment is frivolous, since the informants were not witnesses against him.

[5] See Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 Law & Contemp. Prob. 64 (1948).

from Connecticut for over two years. The latter cause of delay is, of course, not attributable to the government, and the former is not fairly described as "delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" *United States* v. *Lovasco*, *supra*, 431 U.S. at 795, quoting *United States* v. *Marion*, *supra*. In short, the 43-month delay did not deprive petitioner of due process of law. See also *United States* v. *Lai Ming Tanu*, 589 F.2d 82 (2d Cir. 1978); *United States* v. *Mejias*, 552 F.2d 435 (2d Cir.), cert. denied, 434 U.S. 847 (1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 78-1423

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JULIO MUNIZ, DEFENDANT-APPELLANT.

Before: HON. IRVING R. KAUFMAN, Chief Judge, MURRAY I. GURFEIN, (WILLIAM H. MULLIGAN, Recused), Circuit Judges.

New York, March 12, 1979

STATEMENT MADE BY THE COURT AT DISPOSITION OF APPEAL IN OPEN COURT.

JUDGE KAUFMAN: We will affirm in *United States* v. *Muniz*. I would like to state first that Judge Mulligan had disqualified himself and so the decision will be both Judge Gurfein and me, pursuant to the Second Circuit Rule—I refer to Rule 0.14(b)—which permits a decision of this kind, where we're in agreement and the third member finds himself disqualified.

In appealing his conviction for selling the heroin, Julio Muniz has challenged the sufficiency of the identification testimony in trial, and he has asserted that his due process rights were violated by a 43-month delay between the sale and his indictment by

a federal grand jury. We find neither contention convincing.

Viewing the identification evidence in the light most favorable to the Government, I refer you to *United States* v. *Mariani*, 539 F.2d, it is clear that the jury could have been convinced beyond a reasonable doubt that appellant was the person who sold Agent Moniz (as distinguished from spelling of Muniz) the heroin. Even if showing Moniz a single photograph of appellant did taint the initial identification, the taint was completely erased when Moniz met Julio for a second time and was thereby able to reconfirm his identification.

The speedy trial clause of the Sixth Amendment does not cover delay before an indictment, although due process violation may require a dismissal of the indictment. Under the strict test of *United States* v. *Lovasco*, in 431 U.S., we have little difficulty in holding that the delay in returning the federal indictment did not deny appellant due process of law. As Judge Gurfein recently noted, in *United States* v. *Lai Ming Tanu*, decided November 17, 1978, Lovasco requires the defendant to prove not only actual and prejudicial delay, but also improper notice on the part of the Government, in causing the delay. Here appellant did not suffer prejudice because of the absence of Suevez [sic] and Hernandez because, as Judge Clarie found, their testimony, were it to have been available, would more likely have aided the Government than the appellant, and although the lack of prejudice is sufficient basis for us to affirm, we note in addition that

Judge Clarie's finding that the federal prosecutors had not acted improperly was solidly supported by the record. *Lovasco* emphasizes that a decision to defer prosecution to await better evidence, or to avoid prejudicing an ongoing investigation, is well within a prosecutor's discretion, and in *Lai Ming Tanu*, we explicitly held that a United States Attorney had a right to defer to a state prosecution without occasioning a due process violation. Accordingly, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. N 77-104

UNITED STATES OF AMERICA

— *vs* —

JULIO MUNIZ

FINDINGS OF FACT
RE: MOTION TO DISMISS

1. From February, 1974 through January, 1975, agents of the federal Drug Enforcement Administration ("DEA") and the Connecticut Statewide Narcotics Task Force conducted an investigation in the Willimantic, Connecticut area.

2. In the course of that investigation, two informants named Victor Cuevas and Gladys Hernandez ("the informants") offered to introduce DEA undercover agents to heroin dealers in the Willimantic area.

3. On February 11, 1974, the informants introduced Henry Moniz, a Special Agent of the Bureau of Alcohol, Tobacco and Firearms assigned temporarily to DEA, to a person whom Agent Moniz subsequently identified as Julio Muniz. The sale of heroin is alleged in the indictment to have occurred on that date. Although the informants aided in the preliminary negotiations leading to the sale, this sale

of heroin took place out of the presence of the informants.

4. On February 13, 1974, the informants subscribed and swore to the statement which has been admitted into evidence as an exhibit. This statement fully corroborates the Government's theory of the case and Agent Moniz' testimony.

5. On February 14, 1974, Henry Moniz again met with the person whom he identified as Julio Muniz, during which meeting a further sale of heroin was discussed. No sale of heroin took place at that meeting.

6. On February 19, 1974, the informants told officers of the DEA that defendant was planning to flee to Puerto Rico because he had become aware of the identity of Agent Moniz.

7. At that time, Special Agent John Sherry, a DEA officer, decided that no arrest should be made, because the laboratory report describing the contents of the February 11, 1974 purchase had not been received and because an arrest at that time would have confirmed that the informants were acting in behalf of law enforcement officers, thus jeopardizing the federal-state Willimantic investigation.

8. On March 5, 1974 a report was received from the DEA Regional Laboratory, stating that the substance purchased on February 11, 1974, was, in fact, heroin.

9. During the month of March, 1974, agents of the DEA decided to allow the state authorities to proceed with the prosecution of the defendant. Agent

Moniz subscribed and swore to an affidavit describing the events of February 11, 1974, which was turned over to state authorities for use in their prosecution.

10. The federal-state investigation in Willimantic continued until January, 1975. Upon its conclusion, several arrests were made and prosecutions commenced.

11. Among these prosecutions was the prosecution of the defendant. On January 29, 1975, the State's Attorney's Office for Windham County made application for an arrest warrant for the defendant, charging him with a sale of heroin on February 11, 1974, in violation of Connecticut General Statutes §§ 19-480(a) and 19-481(a). Judge Barber signed that arrest warrant.

12. From January 29, 1975 until August 25, 1977, Connecticut authorities were unable to locate and apprehend the defendant. During that period, defendant was twice arrested in Chicago. In addition, defendant's name surfaced in various unrelated federal investigations in Puerto Rico and Chicago. Agent John Sherry has testified that the reason that Connecticut authorities were not contacted concerning the location of the defendant was that information concerning the Connecticut arrest warrant had not been supplied to the National Crime Information Center computer.

13. As a result of this failure to apprehend the defendant and as a result of information concerning the defendant's activities arising in the course of an unrelated investigation, the United States Attorney's

Office decided to seek an indictment against the defendant.

14. As a result of a request by the United States Attorney's Office, the Windham County bench warrant was withdrawn by Superior Court Judge Cramer on August 25, 1977.

15. On September 8, 1977, a federal grand jury returned the indictment in the present case.

16. On September 19, 1977, DEA agents caused defendant to be placed on all want/alert systems.

17. In early 1978, Internal Revenue Service Special Agent George Stern located the defendant in Chicago, and advised DEA Agent John J. Mann that the defendant had been located.

18. On April 17, 1978, the defendant was arrested.

19. On May 1, 1978, a removal hearing was held in the Northern District of Illinois, resulting in the issuance of a warrant of removal.

20. On May 10, 1978, defendant was arraigned before Judge Daly in Bridgeport. Upon the motion of defendant's local counsel, Thomas Fahey, the case was transferred to Hartford.

21. On July 5, 1978, this case was set for trial before the Court, with jury selection schedule to take place on July 6. This Court granted defendant's motion for a continuance, setting down jury selection and trial for early September.

22. After continuing to serve as informants for state and local law enforcement officials, the informants left Connecticut approximately two years ago and have not since that time been in contact with

either DEA agents or the local officers with whom they developed a close relationship. Although DEA agents and local police officers have used all due diligence in attempting to locate the informants in order to obtain their testimony against the defendant, they have been unable to locate them.

23. Criminal prosecution for the event alleged in the present indictment had commenced on January 29, 1975. Any delay in prosecuting the case after January 29, 1975 had been caused solely by the inability of law enforcement officials to apprehend the defendant.

24. No actual prejudice to the conduct of the defense in this case resulted from any delay in trying the defendant. The statement sworn to by the informants at the time of the offense indicates that their testimony would strengthen the Government's case, if the informants could be located to testify.

25. No improper Government motive caused any delay which may have occurred. There has been no showing that the Government intentionally delayed prosecuting this case in order to gain some tactical advantage over the defendant or to harass him.

Dated at Hartford, Connecticut, this 30th day of October, 1978.

/s/ T. Emmet Clarie
T. EMMET CLARIE, Chief Judge

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